"COMPARATIVE RESEARCH ON RIGHT TO STRIKE OF CIVIL SERVANTS – THE U.S. AND JAPAN" (1)

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"Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike."

– Mr. Justice Brandeis in Dorchy v. Kansas, 272 U.S. 306, 311 (1926).

"The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' and which, as the Court has pointed out, was recognized as such in its decisions long before it was given protection by the National Labor Relations Act."

– Mr. Justice Jackson in U.A.W., Local 232, et al v. Wisconsin Employment Relations Board, et al, 336 U.S. 245, 259 (1949)

"Given the fact that there is no Constitutional right to strike, it is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labor collectively and to prohibit strikes by those in public employment . . ."

– United Federation of Postal Clerks v. Blount, 325 F. Supp. 879, 883 (1971).

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Case law in the United States has historically failed to recognize the right of employees in the public sector to take collective strike action in the absence of legislative authority granting such right. Although, there had been some legislative authority recognizing the right of public employees to become members of labor unions since 1912[1], the bulk of the legislation had either excluded public employees from legislation which granted rights to workers in the private sector[2] or specifically proscribed workers in the public sector from striking[3].

The basis for the proscription of strikes within the public sector were the notions of sovereignty and the maintenance of its structural integrity. In an address in 1937, Franklin Roosevelt declared:

> "Upon employees of the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities. This obligation is paramount. Since their own services have to do with the functioning of the Government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.[4]"

In essence, the role of the public employee in the United States was distinguished by the courts and the legislatures from that of the private sector employee. A strike by public employees was a direct challenge to the sovereignty of the State.[5] The right to strike would undermine the structural integrity of the Government in so far as it could become "a

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1. Lloyd-LaFollette Act, 37 Stat. 555 (1912), as amended, 5 USC §7101-02 (1970).
2. eg., National Labor Relations Act of 1935 (Wagner Act)
3. eg., Labor Management Relations Act of 1947 (Taft-Hartley Act) which made it unlawful for federal employees to strike.
4. City of New York v. DeLuty, 243 NE2d 128, 132 (1968)
5. Harrison, "The Strike And Its Alternatives: The Public Employee Experience", 63 Kentucky Law Journal 430, 439, (1974-75)

mechanism through which employees can dictate policy changes and financial priorities"[6] which properly should belong solely in the legislative body. Some commentators contend that the power to strike results in a "distortion of the American political decision-making process".[7]

By having the right-to-strike, in addition ot access to the political process which directs governmental decision-making, public workers are able to assert a disproportionately greater influence upon the allocation of public resources and upon public policies than competing interst groups who do not have the strike weapon.[8]

It is pointed out that "the absence of market restraints and the profit motive"[9] in the public sector removes an important limitation upon unreasonable labor demands. Where a private sector employer has the option in a strike situation to either (1) lock-out the employees; (2) accede to union demands and pass the cost onto the consumers or accept a lower profit; or (3) go out of business.[10]

The public sector employer hasn't options (1) or (3), opponents of the right-to-strike argue. Procedures to raise new révenues to pay for increased labor costs (especially at the state and municipal levels where the ability to simply print more money is not available) are deliberately slow and complex because they are designed to protect the public treasury from raids by powerful interest groups. In short, "price lexibility is an eco-

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6. Harrison, id. at 441
7. Wellington and Winter, "The Limits of Collective Bargaining in Public Employment", 78 Yale Law Journal 1107 (1969)
8. Jedel and Rutherford, "Changing Labor Management Relations in the South", 25 Labor Law Journal 483, 490 (August, 1970) noted that in the 1970 Atlanta Sanitation Strike, the compromise pay raise was met when "(t)he City obtained money for the settlement by appropriating it from other departments, especially the Library Department."
9. Collins, "Labor Relations Law", Annual Survey of American Law, 1974-75: 205
10. Witt, "The Public Sector Strike: Dilemna of the Seventies", 8 Case Western Law Review 102, 108 (1971)

nomic concept unavailable in the public sector. . .[11] Where an impasse arose, the public sector employer would be forced to settle or to attempt to weather the strike.[12] In the latter case, the public's expectation of continuous, necessary services would be severely affected.

The viability of the aforementioned arguments continue to the present. Strikes are still proscribed by case law or statutes in the overwhelming majority of jurisdictions in the United States.[13]

Despite the illegality, public employee strikes have not been quelled, but instead have risen in number dramatically since the mid-1960's.[14] Several factors have been contributory to the increasing militancy demonstrated by public employee unions: the large increase in the number of government employees since the important labor legislation of the 1930's and 1940's[15]; "(t)he great expansion in services performed by the government and the diversification in the nature of the work"[16] making the job-related distinctions between public sector workers and private sector workers more difficult to reconcile with respect to the fact that the right-to-strike had been granted to one group of workers and not the other[17]; and the failture to develop effective machinery for impasse resolution between labor and management in the public sector.

Without doubt, the reticence of public sector employers to come to grips with the labor-management problems underlying the right-to-strike issue has been due to the fact that the illegality of strike actions and its concomitant sanctions (penal and administrative) for a long period of time deterred most public employees from pressing the right-to-strike demand

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11. Id. at 109
12. Id.
13. Collins, supra. note 9 at 204; Fetscher, "Negotiating With The Public: Montana's Public Employee Collective Bargaining Act", 36 Montana Law Review 80, 82 (1975)
14. See Appendix on P. 37
15. Id.
16. Harrison, supra. note 5 at 432
17. Id. at 433

more strongly. In addition, the existence in many jurisdictions of a civil service system or some equivialent thereof gave most public employees some feeling of job security, which was more often lacking in the private sector; this, in turn, induced a reluctance on the part of public employees to jeopardize their job security.

Eventually, the traditional hardline sanctions against illegal strikes by public employees appeared to deter public employee groups less and less as union organization and activity increased at every level of government.[18]

Some sanctions were statutory in form, such as New York's Condon-Wadlin Act which provided for discharge from employment, imprisonment, and a 3 year ban on future government employment.[19] Most penal sanctions derived from contempt of court for failure to heed an injunction issued by the court enforcing the particular statutory prohibition against strikes pursuant to petition by the affected government body.[20] , [21]

Administrative sanctions often took the form of dismissals, demotions, loss of tenure, withdrawal of bargaining rights and check-off privileges, and unfair labor practice charges.[22]

It became readily apparent during the 1960's that "the power to strike" had greater relevance to the public employee unions than "the right to strike" [23] Strike bans could easily be circumvented by alternate tactics

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18. Primeaux, "An Analysis of the Comprehensive Approach to the Public Employee Strike Problem", 44 Mississippi Law Journal 766, 768 (1973): "New York was crippled repeatedly by work stoppages among teacher, sanitation workers, transit workers, firefighters, and even white-collar workers. The federal government wrestled with postal workers' and air traffic controllers' stoppages."
19. Id. at 773
20. Lightenberg, "Some Effect of Strikes and Sanctions – Legal and Practical", 2 Journal of Law and Education 235, 248 (April 1973)
21. Id. at 250: Contempt sanctions were often severe as in "Newark, where more than 200 teachers were jailed and fined; Chicago, where a union president served a 60 day term; . . . and Kankokee, Illinois, where union officials served jail sentences and paid fines. The Neward Teachers Union was fined $270,000 after its second strike in two years."
22. Id. at 247
23. Harrison, supra. note 5 at 432

which created the same effect, eg., sickouts, slowdowns, and other forms of work stoppage.[24] Probably the most widely-used tactic, however, was the incorporation of the demand for blanket amnesty or pardon for all strikers.[25] As one commentator noted:

> "The gravest problem with strike bans . . . has proven to be the 'amnesty strike'. In this situation, government employees refuse to go back to work until they are granted amnesty for walking off the job. When this happens, the strike ban is dead. Instead of operating to deter the strike, the strike prohibition in this event becomes the union's primary vehicle for prolonging the strike and deepening the impasse. This occured during the public transit workers' strike, and the effect was the legislative death of New York's Condon-Wadlin Act."[26]

Constitutional attacks upon strike prohibitions have proceeded mainly on two grounds. The first ground is the contention that the right-to-strike is a fundamental right guaranteed by the 1st Amendment right of free association of the United States Consititution. However, the courts have consistantly declared such right not to exist either in common law or under the Constitution.[27, 28] Those rights deemed fundamental to all workers are limited to "the right to organize collectively and to select representatives for the purposes of engaging in collective bargaining".[29] Further, there is no basis for implying the existence of a right-to-strike from the right to organize and bargain collectively.[30] The right to strike

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24. Primeaux, supra. note 18 at 774
25. eg., Jedel and Rutherford, supra note 8 at 490: the 1970 Atlanta Sanitation Strike resulted in a demand for "reinstatement of all fired workers and amnesty for those employees arrested."
26. Primeaux, supra note 18 at 774
27. Dorchy v. Kansas, supra. page 1; United Federation of Postal Clerks v. Blount, 325 F. Supp. 879 (1971), affirmed 404 US 802 (1971)
28. New York v. DeLuty, supra. note 4 and Los Angeles Unified School District v. United Teachers – Los Angeles, 100 Cal. Rptr. 806, which held that there is no right to strike under their respective state constitutions or in local common law.
29. United Federation of Postal Clerks v. Blount, supra note 27 at 882; McLaughlin v. Tilendis, 398 F2d 287 (1968); Univ. of N.H. Ch. of A.A. of U. Prof. v. Haselton, 397 F. Supp. 107 (1975)
30. United Federation of Postal Clerks v. Blount, supra note 27 at 883

exists only by statutory mandate. The right of workers in the private sector to strike is statutorily prescribed in Article 7 of the National Labor Relations Act (which excluded public employees from its coverage). Consequently, "public employees stand on no stronger footing in this regard than private employees and . . . in the absence of a statute, they do not possess the right to strike."[31]

The second ground is predicated on the contention that "when a government establishes a scheme of private sector bargaining, but none for the public sector, it is a denial of equal protection".[32] This same kind of equal protection argument has been raised in the right-to-strike issue. The federal district court in United Federation of Postal Clerks V. Blount, supra. note 27, dealt with this argument by stating that "(w)here fundamental rights are not involved, a particular classification does not violate the Equal Protection Clause if it is not 'arbitrary' or 'irrational', ie., 'if any state of facts may be conceived to justify it' McGowan v. Maryland, 336 US 420, 426, 81 S Ct 1101, 1101, 6 LE2d 393 (1961)." The court declared that the rational basis standard had been satisfied insofar as "Congress has an obligation to ensure that the machinery of the Federal Government continues to function at all times without interference." Therefore, "(p)rohibition of strikes by its employees is a reasonable implementation of that obligation."[33], [34]

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31. Id.
32. Brown, "Federal Legislation for Public Sector Collective Bargaining: A Minimum Standards Approach", 5 University of Toledo Law Review 681, 691 (Spring, 1974)
33. In concurring with the majority, Judge Wright declared that the right to strike was "intimately" related to the right to organize insofar as the right to strike promoted the fundamental purposes behind the right to organize. Therefore the right to strike should not be limited absent "compelling" state justification.
34. See also City of New York v. DeLuty, supra note 4 at 131 in which the appellate court declared that "the state, in governing its internal affairs, had the power to prohibit any strike if the prohibition was reasonably calculated to achieve a valid State policy in an area which was open to State regulation."

In an attempt to undercut the necessity for public employees to engage in illegal strikes, jurisdictions began to establish machinery to resolve labor-management disputes within the framework of the existing strike prohibition. In 1962, President Kennedy promulgated Executive Order 10,988, which established various levels of union recognition, providing for a checkoff system and granting federal employees the right to bargain collectively,[35] albeit limited in scope.[36], [37] Following suit, "many states . . . enacted legislation dealing with public labor relations; and by 1973, thirty-four jurisdictions had enacted statutes 'either permitting or requiring designated public employers to bargain collectively with their employees'."[38] Most of the new legislation and directives incorporated mediation, fact-finding, various types of arbitration or some combination thereof.[39] Despite the dispute-settlement machinery, the number of strikes in the public sector had continued to increase, suggesting that many of the new innovations were not adequate to function as was intended.[40], [41]

Nevertheless, the legislative activity has had some effect in a few jurisdictions upon subsequent judicial decisions. In Michigan, Rhode Island,

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35. Seidenberg, "Federal Sector Overview: Collective Bargaining – An Address Before the 1975 Seminar on 'Employee Relations in the Federal Government'", 34 Federal Bar Journal 229, 230 (Summer 1975)
36. Zimmer, "Collective Bargaining in the Federal Service: The Permissable Scope of Negotiations Under Executive Order 11,491", 25 Case Western Law Review 193, 194 (Fall, 1974): excluded wages and salaries as bargainable items.
37. Id. at 196: followed by Executive Order 11,491 under President Nixon.
38. Correia, "Labor Law – Public Employees – Court Adds 'Public Interest' to the Criteria Used for Determining Appropriate Bargaining Units", 5 Seton Hall Law Review, 937, 943 (Summer, 1974)
39. Harrison, supra. note 5 at 448
40. Primeaux, supra. note 18 at 770
41. Persico, "Reexamination of Maryland Policy Concerning Public Employee Strikes", 3 University of Baltimore 235, 240 (Spring, 1974): New York's Taylor Law, enacted April 21, 1967, granted right to organize and bargain collectively; impasses to be resolved by the Public Employee Relations Board. In 1969, 15 work stoppages involving 2,390 workers; in 1970, 36 work stoppages involving 65,930 workers; and in 1971, 19 work stoppages involving 32,900 workers.

and New Hampshire, the supreme court in each state "refused to issue injunctions without a showing of irreparable harm to the community."[42] And in Montana, the state supreme court affirmed a trial court holding which declared that the statute granting public employees the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection" included the right to strike.[43]

Since 1967, eight states (Alaska, Hawaii, Idaho, Minnesota, Montana, Oregon, Pennsylyania, and Vermont)[44] have granted to public employees a limited statutory right to strike. The legislation have generally excluded certain categories of essential employees, eg., police, firemen, guards of correctional and mental institutions[45]; required exhaustion of specified bargaining procedures, coupled with prior notice, before engaging in any strike activity; permitted strikes only where it will not endanger public health, safety or welfare.[46] The right to strike is treated as a remedy of "last resort" and "not a preferred dispute resolution technique".[47]

It is generally the courts which determine whether there is a sufficient threat to the public health, safety, and welfare to merit an injunction against strike action.[48] However, this limitation on the right to strike has tended to raise controversey in terms of its definition and application. In Philadelphia Federation of Teachers, et al v. William Ross, et al, 301 A2d 405 (1973), the court found sufficient danger to warrant an injunction

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42. Britain, "Labor Law – The Illinois Anti-Injunction Act Is Not Applicable To Strikes By Public Sector Employees And Such Strikes Are Illegal Per Se et al", 6 Loyola University of Chicago Law Journal, 187, 198 (1975)
43. State, Department of Highways v. Public Employees Craft Council, 549 P2d 785 (1974)
44. Fetscher, supra. note 13 at 82
45. Collins, supra. note 9 at 206
46. Id.
47. Coughlin and Rader, "Right to Strike and Compulsory Arbitration: Panecea or Placebo?", 58 Marquette Law Review 205, 214 (1975)
48. Id. at 229
49. Alderfer, "Follow-Up on the Pennsylvania Public School Strikes", 25 Labor Law Journal 161, 165 (March, 1974)
50. Id. at 166

against the strike on the grounds that "the strike (1) threatened to increase gang activity and thereby added an additional cost of $133,000 a day for police protection; (2) threatened financial loss to a debt-ridden school district; and (3) might make it impossible to make up instructional days later in the school year."[49] Yet, in another decision, Armstrong Education Association v. Armstrong School District, 291 A2d 120 (1972), a Pennsylvania appellate court reversed an injunction granted by a lower court on similar grounds: "(1) the disruption of school time and routine; (2) the harassment of school board directors; and (3) the danger of losing state subsidy". The appellate court declared that "inconvenience was not necessarily a danger and that the legislature assumed that normally a strike would result in inconvenience . . ."[50]

The effect that the right-to-strike legislation has had in terms of labor-management relations in the public sector is inconclusive at best. One commentator has noted that "(m)ost of the states passing such laws have had little or no strike activity before or after the adoption of right-to-strike legislation."[51] The single exception was in Pennsylvania, which saw a high incidence of public employee strikes prior to passage of its right-to-strike legislation in 1970 increase after passage of the legislation[52], thereby suggesting that "right-to-strike legislation does not necessarily reduce the number of strikes in a situation where there is already a high level of strike activity."[53]

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51. Coughlin and Rader, supra. note 47 at 235
52. Id. at 236
53. Id. at 237

APPENDIX

A. Public Emplyee Work Stoppages : (1)

	Yr.	No.	Workers	Man-Idle Days
	1961	28	6,610	15,300
	1962	28	31,100	79,100
	1963	29	4,840	15,400
	1964	41	22,700	70,800
	1965	42	11,900	146,000
Gov't	1966	142	105,000	455,000
State		9	3,090	6,010
Local		133	102,000	449,000
Gov't	1967	181	132,000	1,250,000
State		12	4,670	16,300
Local		169	129,000	1,230,000
Gov't	1968	254	202,000	2,550,000
Fed		----	----------	----------
State		16	9,300	42,800
Local		235	190,900	2,492,800
Gov't	1969	411	160,000	745,700
Fed		2	600	1,100
State		37	20,500	152,400
Local		392	139,000	592,200
Gov't	1970	412	333,500	2,023,300
Fed		3	155,800	648,300
State		23	8,800	44,600
Local		386	168,800	1,330,400
Gov't	1971	329	152,600	901,400
Fed		2	1,000	8,100
State		23	14,500	81,800
Local		304	137,100	811,500
Gov't	1972	375	142,100	1,257,300
Fed		----	----------	----------
State		40	27,400	273,700
County		30	8,800	50,300
City		128	19,900	135,600
School Dist.		171	85,600	796,000
Other Local Gov't		6	400	1,600

(1) United States Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics 1974 at 383-386.

APPENDIX (cont'd)

B. Government Employment-Union Membership (1)

Year (2)	Total No. of Employees	No. of Unions	Union Membership	% of Union Membership
1962	9,388,000	41	1,225,000	7.0%
1964	10,064,000	59	1,453,000	8.1
1968	12,342,000	59	2,155,000	10.7
1970	13,028,000	60	2,318,000	11.2
1972	13,603,000	51	2,460,000	11.8

(1) United States Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics 1974 at 117, 359-63.
(2) No statistics were reported for the intervening years.